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Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WILLARD Y. MORRIS, Executor
of the Estate of William Shields,

Respondent,

vs.

TED RUSSELL and MANILA RUS-
SELL, his wife,

Appellants.

Case No. 7630

REPLY BRIEF OF APPELLANTS

FILE

SEP 10 1951 RICHARDS AND BIRD and

DAN S. BUSHNELL,

Clark, Supreme Court, U

Attorneys for Appellants.

ERRATA

Page 4, line 18, citation should be 255 Pac. 1039

Page 10, 4th line from bottom, citation should be 269 Pac.

Page 2, following POINT I should be inserted:

Since the pleadings and evidence of both parties establish an express contract, it was error to submit the case to the jury on the theory of quantum meruit.

Page 6, following POINT II should be inserted:

It was error for the court to vacate its judgment of involuntary dismissal made following the close of the plaintiff's case.

Page 7, following POINT III should be inserted:

The court erred in permitting the jury to award damages for the period prior to February 23, 1946, under Section 104-2-2 U.C.A. 1943.

Page 9, following POINT IV should be inserted:

The court erred in refusing to grant a new trial on the evidence of insanity and presumed insanity.

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Pages 1-17 inclusive of the brief of respondent endeavor to excite sympathy for the deceased plaintiff and show how much work he performed for the compensation appellants agreed to pay.

Appellants have not assigned as error insufficiency of the evidence to establish the express contract pleaded by the deceased, nor insufficiency of the evidence to sustain the verdict if the issue be reasonable value of the services rendered. The lengthy statement of facts of respondent is, we submit, devoted to immaterial issues, or else to an effort to mislead the Court as to what the issues on appeal are.

Appellants reply briefly to the four points covered by the brief of respondent.

POINT I.

Pages 20 and 21 of respondent's brief discuss joinder of actions in express contract and in quantum meruit. No issue of this was made by appellants except to take the position that all of the pleadings in this case show that each side contends for an express contract and since the express contract is thereby admitted the quantum meruit falls by the wayside and the only issue is: What was the contract? A pre-trial should have limited the issues to the express contract but in the absence of that it might have been proper for the plaintiff to produce evidence to see whether the Court found evidence of the express contract. At the close of the plaintiff's case, when evidence of an express contract had been offered, the defendants properly moved to dismiss, since the defendants pleaded the express contract and denied plaintiff's allegations as to the terms.

At the top of Page 22, respondent quotes this sound statement from Bancroft:

“Under certain authorities, it is the rule that a party declaring upon an express contract cannot recover on an implied contract or on a quantum meruit.”

This rule is supported by citations of cases from California, Colorado, Iowa, Indiana, Kansas, Minnesota, Nebraska, New Jersey, South Dakota, Wisconsin Wyoming and Oklahoma. The rest of the quotation shown in respondent's brief is:

“In other states, however, it is the settled law that where the complaint alleges a special contract only and the proof fails to establish it, but does in fact show the rendition of services, a recovery may be had upon quantum meruit.”

This portion of the quotation is not in point because the proof in our case supports a special contract, leaving open only the question as to what the precise terms were.

At the bottom of the same Page 22, respondent quotes from Bancroft on code pleading Section 705. With cases from four states in support of the rule, it is not plain why Bancroft refers to it as a general rule; and in any event, this quotation from Bancroft does not deal with the problem here involved. It is true that a plaintiff may plead alternative counts of express contract and quantum meruit; and if the answer

denies both counts there is a proper case to be decided and the recovery may be on either count. Bancroft does not say that where an answer to a complaint in alternative counts admits the express contract but denies the measure of recovery that there can then be a trial on the question of quantum meruit.

In Bancroft's Supplement to Section 705 the following is stated:

“Where two causes of action are stated, one on an express contract and the other for reasonable value, the defendant admits the contract but contradicts its terms, it has been held not error for the Court to determine the issue on principles of quantum meruit.”

This is a backwards statement but puts our case exactly and states it adversely to us. However, the case upon which Bancroft relies is *Holmes vs. Radford*, 143 Washington 644, 266 Pac. 1039, and the case does not support the text. In that case an architect sued for the value of his services under an express contract and alternatively for the reasonable value of his services. The answer admitted the employment and the express contract and denied the terms as pleaded by the architect. So far the case is like ours. But the proof showed uncertainty as to whether an express contract was made and the position of the defendant was that there was no express agreement as to the compensation until after performance had started and that the parties then agreed on what the compensation would be. The Court held that the defendant was proving a modified contract

which was not pleaded and further found that there was no meeting of the minds at the time of the original discussions, and, therefore, no contract. The parties did not meet on the issue of what the contract was, since the defendant in effect admitted no express contract to begin with and tried to prove a later agreement after the services had commenced, which he failed to establish.

In our case the evidence of both parties is that an express agreement was made at the time the parties moved to the tourist court. There is no contention that there was no meeting of the minds, but only a dispute in testimony as to the term of compensation upon which their minds met. The applicable rule is correctly stated by Williston and the Restatement of Contracts cited at Page 17 of our brief.

In any event, if Bancroft in Section 705 means what respondent contends for the quotation on Page 22, appellants simply take issue with it and advance the authorities in our original brief as stating the law on this question.

Respondent advances a new thought on Page 19. If it be assumed that there was an express contract between the parties to do the work of a handyman for board and room and incidental money, then respondent could still recover the value of work done in excess or beyond the terms or requirements of the express contract. If such were the facts and they be established by pleadings, evidence and instructions to the jury, we agree that such position is sound. The trouble with it

is that neither the pleadings, nor the evidence, nor the instructions permit a verdict on any such theory.

POINT II.

Respondent makes an assertion at Page 9, repeated at Pages 24 and 25 of its brief, that after the motion to dismiss the quantum meruit count was granted, counsel went into chambers, presented authorities, and the Court took the matter under advisement. The record is silent on any such action, and this Court must assume that the record reflects the case as it was tried. Assuming that the facts were as contended by respondent, the legal effect would be no different. After the motion to dismiss had been granted, according to the authorities cited by us, the Court had no further jurisdiction of the dismissed cause of action, except to order a new trial in furtherance of justice. If the Court took its own ruling under advisement to determine whether it was erroneous, the proper effect of the Court's reconsideration was to consider whether a new trial should at a subsequent time be granted.

Respondent argues that the appellant offered evidence germane to the issue of quantum meruit. Actually, appellants offered evidence of the work deceased did, but none as to its value. This evidence was also germane to the issue of what the expressed contract between the parties was, as the nature of the work done by the deceased would tend to support the respective contentions of the parties. It does not follow that this evidence

would have been submitted in this manner or at all had the issue of quantum meruit remained in the case.

Respondent cites Rule 61 of the Utah Rules of Civil Procedure at Page 27 with which rule we are perfectly content. As we read this rule, it says that the Court could have granted a new trial if its ruling on quantum meruit was erroneous, but need not have granted it. If no new trial was granted then the quantum meruit count stayed out of the case and was improperly the subject of instructions to the jury. This is the law established in *Robinson v. Salt Lake City*, 39 Utah 580, and *Tintic Standard Mining Company v. Utah County*, 80 Utah 491.

POINT III.

Respondent argues first that if the statute of limitations is applicable, the statute was tolled because this was an open account for services rendered, and then argues that it was a contract for continuous employment upon which no cause of action accrued until the services were terminated.

At Page 31 respondent's brief states:

“* * * that cash and clothing were paid to plaintiff, which we submit were payments on account which tolled the statute of limitations, if such were applicable.”

Respondent cites no supporting cases except an excerpt from the annotation at 36 A.L.R. 346 at Page 350.

It seems obvious to appellants that there was no open account between the deceased and the appellants. The requirements of the Utah case cited at Page 22 of our brief (*Bishop v. Parker*, 103 Utah 145) cannot be met by respondent. There was no account kept by appellants, no showing that any clothing or money paid to deceased was on an account, and no showing that any balance was ever computed by either party, let alone called to the attention of the appellants. The lone reference to any record was the deceased's statement that he made entries in a book (108). Deceased's statement that the book had been lost was stricken and there is no evidence of what the book contained nor any statement that the appellants knew about it.

Respondent quotes from 36 A.L.R. at Page 350 the statement which deals with an account for services where a balance has been shown and entries made by the debtor in the account. It would be more appropriate to quote from Pages 355-357 of the same annotation where the cases say that the debtor must have knowledge of charges in the account before any payment can have validity to toll the statute of limitations as the theory is based, after all, on an implied promise to pay the balance.

The items of clothing and the money paid by appellants to the deceased are entirely consistent with their agreement that deceased should have board and room, clothing and money for incidentals (149, 183, 227).

As to whether the contract was a continuous one calling for payment at the end of the term, or contract

calling for monthly payment, respondent cites no authorities except 58 Amer. Juris 556 at Pages 35 and 36 of his brief and for the rest discusses the cases in appellant's original brief. The American Jurisprudence citation stopped short. The next language is :

“Where, however, the hiring of services is without agreement as to term or amount of compensation, and there is no evidence of payments, the law, it seems, will not imply an agreement that payment of compensation shall be postponed until the termination of the employment.”

There was no testimony of an agreement postponing date of payment of compensation to the deceased. The conversation testified to by deceased was for \$100.00 a month. Under the authorities cited by us there can be no question that if such be the agreement the causes of action accrued monthly and the failure of deceased to do anything about it resulted in barring of his action for the period prior to February 23, 1946.

At Pages 36-38 respondent belabours our mistaken statement that the contract there was to run until the death of the mother. The mistake is immaterial. In our case the contract was for a certain rate per month and therefore payable monthly and not for continuous services as in the Gulbrandson case.

POINT IV.

On Page 39, respondent argues that the evidence of insanity was not newly discovered and that the Judge

could have so found. That is a matter for the Court to determine in its discretion and the Court did not dismiss or strike the motion for new trial but denied it, and presumably accepted at face value the allegations that the evidence was newly discovered (R. 31).

Respondent then argues that appellants must have known Shields was insane because they lived together for several years. The sanity of the deceased cannot be determined on this appeal and the purpose of this point on the appeal is to have the question of insanity adjudicated in a proper manner.

Respondent at Pages 40-42 urges that the defense of incapacity to sue has been waived. The statutes which control *Tooele Meat and Storage Company v. Elite Candy Company*, 57 Utah 1, are superseded by the Rules of Civil Procedure. Rule 17 (b) establishes the incapacity of an insane person to bring the suit; Rule 12 (h) establishes the waiver, and Rule 60 (b) provides relief from mistakes from inadvertence or upon newly discovered evidence. The evidence which has been newly discovered shows that there was no waiver of the defense because the defense was not known to be available, thereby overcoming the phrase in Rule 12 (h) "a party waives all defenses." The Tooele Meat case was a collateral attack upon the judgment. The correct approach is found in *J. B. Colt Company v. District Court*, 72 Utah 281, 267 P. 1017, where relief was denied only because more than six months had passed since judgment.

We take issue with respondent's statement that the

Oregon guardianship was terminated. Neither absence from the hospital by escape nor discharge of a guardian is an adjudication of sanity.

Respondent attempts to brush aside problems arising from an insane person's incapacity to contract and to testify as argued in our brief. The fact that an insane person is entitled to recovery for the reasonable value of his services, when a suit is brought by his guardian, is no answer. If the Court had instructed on that theory after determining the insanity of the deceased that might be an answer; but the instructions of the Court, the pleadings, and the evidence are consistent with accepting the testimony of the deceased and recognizing his power to contract, which elements can be eliminated from consideration only through granting the motion for new trial.

CONCLUSION

Appellants have presented four points supported by authorities, each of which constitutes an adequate basis for reversal of the District Court and granting the motion for new trial.

Respectfully submitted,

RICHARDS AND BIRD and
DAN S. BUSHNELL,
Attorneys for Appellants.